

1 **LAW OFFICES OF DALE K. GALIPO**

2 Dale K. Galipo, Esq. (Bar No. 144074)

3 dalekgalipo@yahoo.com

4 Hang D. Le, Esq. (Bar No. 293450)

5 hlee@galipolaw.com

6 21800 Burbank Boulevard, Suite 310

7 Woodland Hills, California, 91367

8 Telephone: (818) 347-3333

9 Facsimile: (818) 347-4118

10 Attorneys for Plaintiffs

11 JONATHAN WAYNE BOTTEN, SR.,

12 TANJA DUDEK-BOTTEN, ANNABELLE BOTTEN,
13 AND J.B.

14 JONATHAN WAYNE BOTTEN, SR.;
15 TANJA DUDEK-BOTTEN;
16 ANNABELLE BOTTEN; and J.B., a
17 minor, by and through his guardian
18 JONATHAN WAYNE BOTTEN, SR.,

19 Plaintiffs,

20 vs.

21 STATE OF CALIFORNIA; COUNTY
22 OF SAN BERNARDINO; ISAIAH
23 KEE; MICHAEL BLACKWOOD;
24 BERNARDO RUBALCAVA;
25 ROBERT VACCARI; JAKE ADAMS;
26 and DOES 1-10, inclusive,

27 Defendants.

28 Case No. 5:23-cv-00257-KK-SHK

29 *Hon. Kenly Kiya Kato*

30 **PLAINTIFFS' CONSOLIDATED
31 REPLY IN SUPPORT OF
32 PLAINTIFFS' MOTION TO
33 CONSOLIDATE**

34 Hearing Date: April 4, 2024

35 Time: 9:30 a.m.

36 Crtrm: 3

37 Complaint filed: February 17, 2023

1 **I. THE TWO CASES INVOLVE MULTIPLE COMMON QUESTIONS**
 2 **OF LAW AND FACT AND ARISE OUT OF THE SAME SHOOTING**
 3 **INCIDENT**

4 County Defendants contend in their Opposition that this case should not be
 5 consolidated with *L.C., et al. v. State of California, et al.*, case no. 5:22-cv-00949-
 6 KK-SHK, because the common material facts are only “superficial” and that the
 7 evidence to support and defend the claims are “drastically different.” This is not so.
 8 As State Defendants conceded in their opposition, both cases arise out of the same
 9 officer-related incident that occurred on February 17, 2021 near 17994 Catalpa
 10 Street in Hesperia, California that ultimately resulted in an officer-involved shooting
 11 that struck Decedent Hector Puga, and Plaintiffs Jonathan Wayne Botten, Sr., Tanja
 12 Dudek-Botten, and J.B. Decedent Puga ultimately died from his gunshot wounds
 13 while Plaintiffs Botten, Sr., Dudek-Botten, and J.B. suffered serious medical
 14 injuries.

15 “The threshold issue [in determining whether to consolidate cases] is whether
 16 the two proceedings involve a common party and common issues of fact or law.”
 17 *Seguro de Servicio de Salud v. McAuto Sys. Group*, 878 F.2d 5, 8 (1st Cir. 1989).
 18 Courts have consolidated cases when they share the same core issues and a common
 19 nucleus of facts for proof, despite there being differences in injuries, damages, and
 20 other factual differences. *See, e.g., Baron v. Galactic Co., LLC*, No.
 21 123CV01067JLTCDB, 2023 WL 8358368, at *3 (E.D. Cal. Dec. 1, 2023)
 22 (consolidating cases due to a common theory of liability and common nucleus of
 23 facts despite differences in the circumstances surrounding the plaintiffs’ claims);
 24 *Blount v. Bos. Sci. Corp.*, No. 1:19-CV-0578 AWI SAB, 2019 WL 3943872, at *2–3
 25 (E.D. Cal. Aug. 21, 2019) (consolidating four trials into one because all plaintiffs
 26 were making the same claims involving the same defendant and had cross-over of
 27 expert witnesses despite the injuries and circumstances surrounding the injuries
 28 being different); *Torres v. City of Madera*, No. CV-F-02-6385-AWI-LJO, 2004 WL

1 7336949, at *2 (E.D. Cal. Feb. 12, 2004) (consolidating a civil rights case with a
 2 products liability action because both cases arise out of the same set of facts);
 3 *Burnett v. Rowzee*, No. SACV07641DOCANX, 2007 WL 4191991, at *3, 5 (C.D.
 4 Cal. Nov. 26, 2007) (consolidating three cases because the core factual dispute for
 5 each of the claims is a specific Ponzi Scheme, despite there being differences in
 6 specific facts and “the various plaintiffs’ relationships to various defendants”).

7 *Young v. City of Augusta*, 59 F.3d 1160 (11th Cir. 1995) is instructive here.
 8 *Young* involved a plaintiff’s Eighth Amendment claim against prison officials for
 9 improper treatment of her mental health condition. The plaintiff alleged that the city
 10 failed to adequately train or select jail personnel to deal with inmates suffering from
 11 mental illness. *Id.* at 1165. *Young* sought consolidation with another case against the
 12 city with an Eighth Amendment claim for improper mental health treatment. *Id.* The
 13 Eleventh Circuit disagreed with the magistrate judge’s finding that there were no
 14 common issues or law or fact in the cases and reasoned that consolidation would
 15 have been appropriate, despite there being differences between the two actions in
 16 that each plaintiff alleged a different set of facts concerning his or her medical needs
 17 and the responses by the jail employees. *Id.* at 1168-69. Here, the commonalities of
 18 the two cases, including both cases arising out of the *same* incident, same nucleus of
 19 facts, and asserting the same claims provide even stronger support for consolidation.

20 In the early morning hours of February 17, 2021, Defendants Isaiah Kee,
 21 Michael Blackwood, Bernardo Rubalcava (“CHP Officer Defendants”), Robert
 22 Vaccari, and Jake Adams (“County Deputy Defendants”) pursued Decedent Hector
 23 Puga to the area around 17994 Catalpa Street in Hesperia, California (“Botten
 24 Residence”) and attempted to detain and arrest him. (See Dkt. No. 27, ¶¶ 25-27). In
 25 doing so, CHP Officer Defendants and County Deputy Defendants had their
 26 overhead lights on, their firearms and less-lethal weapons out, pointed their weapons
 27 at Decedent Puga, made several announcements to Decedent Puga, and had the
 28 assistance of a law enforcement helicopter flying overhead. Based on the police

1 activity and the CHP Officer Defendants and County Deputy Defendants' show of
 2 authority outside their home, the Botten Plaintiffs believed that they were not free to
 3 leave their residence. (See Dkt. No. 27, ¶¶ 28-30). Ultimately, an officer-involved
 4 shooting occurred and the shots struck not only Decedent Puga but also Plaintiffs
 5 Botten, Sr., Dudek-Botten, and J.B. Both cases are being asserted against the same
 6 defendants for injuries that were sustained as a result of the February 17, 2021
 7 officer-involved shooting. While the injuries are different and there will be some
 8 evidence that differs in supporting the liability and damages for both cases, the
 9 actions and mental processes of the CHP Officer Defendants and County Deputy
 10 Defendants are central to both matters and will result in significant overlap of
 11 testimony and facts. *See Torres*, 2004 WL 7336949, at *2 (consolidating a civil
 12 rights case and a products liability Taser case because the actions and mental
 13 processes of the officer were central to both matters and would result in significant
 14 overlap of testimony and facts).

15 Additionally, both County Defendants and State Defendants contend that
 16 while both cases assert the same claims, the Botten Plaintiffs rely on a different
 17 theory of liability to support their claims and the defense to those claims will be
 18 different. While intent may play a role in the defense with regards to the Botten
 19 Plaintiffs' Fourth Amendment and Bane Act claims, it is not material to the Botten
 20 Plaintiffs' Fourteenth Amendment, battery, and negligence claims. Indeed, assuming
 21 arguendo that Defendants could show that the defendant officers did not intend to
 22 strike the Botten Plaintiffs when they discharged their guns, this would provide even
 23 greater support for consolidation as the Botten Plaintiffs' battery claim would
 24 essentially rest on the same theory of liability as the Puga Plaintiffs. *See Rodriguez*
 25 *v. City of Fresno*, 819 F. Supp. 2d 937, 953 (E.D. Cal. 2011) ("Under the doctrine of
 26 transferred intent, the viability of a claim of battery by a bystander against a police
 27 officer turns on the reasonability of the application of force by the police officer
 28 against the intended suspect."). There are more commonalities between this case and

1 *L.C., et al. v. State of California, et al.*, than there are differences, including that
 2 both cases arise out of the same incident, same nucleus of facts, and assert the same
 3 claims. Accordingly, consolidation of *Botten, et al. v. State of California, et al.* with
 4 *L.C., et al. v. State of California, et al.*, will not only save judicial resources and
 5 enhance court efficiency, but it will also avoid the substantial danger of inconsistent
 6 adjudications if these cases were tried separately. *See Torres*, 2004 WL 7336949, at
 7 *1 (citing *E.E.C.O. v. HBE Corp.*, 135 F.3d 543, 551 (8th Cir. 1998)).

8 **II. ANY RISK OF PREJUDICE AND CONFUSION CAN BE**
 9 **ADEQUATELY ADDRESS THROUGH SPECIAL VERDICT FORMS**
 10 **AND JURY INSTRUCTIONS**

11 Defendants further contend that consolidation, especially of trial in the two
 12 cases, would produce substantial prejudice to Defendants as they speculate that the
 13 jury will unlikely be able to separate the officers' conduct towards Decedent Puga
 14 and their conduct towards the Bottens and will result in juror confusion due to the
 15 different legal standards for the Puga Plaintiffs and Botten Plaintiffs' § 1983 claims.
 16 This contention is purely speculative and courts have routinely held that any risk of
 17 prejudice or confusion in consolidating multiple cases for trial can be adequately
 18 addressed through jury instructions, separate verdict forms, and the trial process. *See*
 19 *Blount*, 2019 WL 3943872, at *2-3, 4 (consolidating four cases into one for trial
 20 despite different medical backgrounds and different injuries suffered by different
 21 plaintiffs in part because "it is entirely possible to instruct the jury to treat each case
 22 separately" and any danger of confusion "can be sufficiently alleviated through jury
 23 instructions and the trial process."); *Burnett*, 2007 WL 4191991, at *5 ("the parties
 24 and the Court should be able to reduce confusion by properly structuring argument
 25 and instructing the jury."); *Torres*, 2004 WL 7336949, at *2 ("the risk of confusion
 26 can be handled through a verdict form and jury instructions."); *Campbell v. Bos. Sci.*
 27 *Corp.*, 882 F.3d 70, 74-75 (4th Cir. 2018) (noting that the district court's instruction
 28 to the jury "that the trial concerned four separate claims and informed them that they

1 must treat each as ‘as if each have been tried by itself,’” to have sufficiently
2 alleviated any prejudice or confusion); *Eghnayem v. Bos. Sci. Corp.*, 873 F.3d 1304,
3 1313–14 (11th Cir. 2017) (rejecting the contention that consolidation of four cases
4 into one for trial caused prejudice and confusion because “most of the evidence
5 went toward the common claims among the plaintiffs” and trial court’s instruction
6 that “[y]ou may not even consider the fact that there’s more than one case being
7 brought” to sufficiently have addressed any concerns of prejudice or confusion).

8 Accordingly, any potential risk of prejudice or confusion in trying these two
9 cases together can be adequately addressed through jury instructions, separate
10 verdict forms, and the structure of the trial.

11 **III. CONCLUSION**

12 For the reasons discussed above, the Court grant this Motion to Consolidate
13 and issue an order consolidating *See L.C., et al. v. State of California, et al.*, case no.
14 5:22-cv-00949-KK-SHK and *Botten, et al. v. State of California, et al.*, case no.
15 5:23-cv-00257-KK-SHK for all purposes, including trial.

16

17

18 DATED: March 21, 2024

LAW OFFICES OF DALE K. GALIPO

19

20

21

By _____ /s/ *Hang D. Le*
22 Dale K. Galipo
23 Hang D. Le
24 Attorneys for Plaintiffs

25

26

27

28